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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Parts 2 and 15 to Prohibit Mar-
keting of Radio Scanners Capable of Intercepting
Cellular Telephone Conversations

ET Docket No. 93-1

To: The Commission

COMMENTS OF BELL SOUTH

BellSouth Corporation, BellSouth Enterprises, Inc., BellSouth Cellular Corp., BellSouth Mobility Inc, and American Cellular Communications Corporation (collectively "BellSouth"), by their attorneys, hereby submit comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in ET Docket No. 93-1.^{1/} The NPRM proposed amendments to Parts 2 and 15 of the Rules to prohibit the manufacture or importation of radio scanners capable of receiving (or being readily modified to receive) frequencies allocated to the Domestic Public Cellular Radio Telecommunications Service as well as converters enabling scanners to receive cellular frequencies (collectively "cellular-capable scanners").

STATEMENT OF INTEREST

Through its subsidiaries, BellSouth operates numerous cellular systems in various market areas throughout the country. As a cellular carrier, BellSouth has a direct interest in providing the best practical service to its subscribers and protecting the privacy of cellular communications. In this regard, BellSouth strongly supports the Commission's efforts in this docket. The proposed rules fairly balance

^{1/} Amendment of Parts 2 and 15 to Prohibit Marketing of Radio Scanners Capable of Intercepting Cellular Telephone Conversations, Notice of Proposed Rulemaking, ET Docket No. 93-1, FCC 93-1 (January 13, 1993) ("NPRM"). The NPRM implements Section 401 of the Telephone Disclosure and Dispute Resolution Act, Pub. L. No. 102-556, § 401, 106 Stat. 4181 (1992).

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the twin goals of "increas[ing] the privacy protection of cellular telephone users without unduly restricting legitimate uses of scanners." ^{2/} While BellSouth supports the proposed rules, it recommends that the Commission adopt the following modifications consistent with its goals.

I. EFFECTIVE APRIL 26, 1993, THE COMMISSION SHOULD DENY ANY PENDING APPLICATIONS FOR EQUIPMENT AUTHORIZATION OF CELLULAR-CAPABLE SCANNERS

BellSouth supports the Commission's proposal not to accept applications for equipment authorization for cellular-capable scanners effective April 26, 1993, as set forth in proposed § 15.37(f). However, the rule is silent as to the disposition of applications accepted prior to that date, leaving open the possibility that an application that is pending on April 26, 1993 could be granted, resulting in the legal manufacture of new models of cellular-capable scanners from the date of grant through April 26, 1994.

This unintended result would be contrary to the terms of the statute, which requires the Commission not merely to cease accepting applications by April 26, 1993, but instead to "make effective regulations denying equipment authorization" for cellular-capable scanners by that date. Accordingly, BellSouth suggests that the second sentence of proposed § 15.37(f) be revised to read:

Effective April 26, 1993, the Commission shall deny applications for equipment authorization for receivers that do not comply with the provisions of Section 15.121 of this Part.

BellSouth submits that this language will more clearly and effectively carry out the goal of the statute and close a loophole that could be created by the rule as proposed.

^{2/} "'Scanners' are radio receivers that automatically switch between four or more frequencies anywhere within the 30-960 MHz band." NPRM at ¶ 3. See also 47 C.F.R. § 15.3(v). "Receivers designed solely . . . for operation as part of a licensed station are not included in this definition." Id.

II. EFFECTIVE APRIL 26, 1994, THE COMMISSION SHOULD WITHDRAW ALL PREVIOUSLY GRANTED EQUIPMENT AUTHORIZATIONS FOR CELLULAR-CAPABLE SCANNERS, THEREBY PROHIBITING THE SALE OF SUCH SCANNERS, AND NOT MERELY THEIR MANUFACTURE AND IMPORTATION

BellSouth recommends closing another loophole in the rules that could result in cellular-capable scanners being sold long after the new rules go into effect. As proposed, § 15.37(f) would permit the sale of cellular-capable scanners even after April 26, 1994, as long as they were manufactured or imported prior to that date pursuant to a valid equipment authorization. A manufacturer or importer could thus build up a large inventory of cellular-capable scanners before April 26, 1994 and would be free to sell the units from that inventory long after that date.

This would clearly contravene the purpose of the law --to stop the sale of cellular-capable scanners. BellSouth suggests, therefore, that the Commission take steps in this proceeding to withdraw any previously granted equipment authorizations for cellular-capable scanners, effective April 26, 1994. Once these scanners have had their equipment authorization withdrawn, it will become unlawful to "sell or lease, or offer to sell or lease (including advertising for sale or lease) or import, ship or distribute for the purpose of selling or leasing or offering for sale or lease, any such" cellular-capable scanner.^{2/} Moreover, the Commission's rules provide that "radio frequency devices that could not be granted an equipment authorization . . . shall not be advertised or displayed or offered for sale or lease or sold or leased."^{4/}

The Commission has ample authority to prevent the continued marketing of cellular-capable scanners. Section 2.939(c) permits the Commission to "withdraw any equipment authorization in the event of changes in its technical standards" provided that the procedure for such withdrawal is "set forth in the order promulgating such new technical standards" and the Commission "provide[s] a suitable

^{2/} 47 C.F.R. § 2.803.

^{4/} Id.

amortization period for equipment in hands of users and in the manufacturing process." ^{2/} Because this rulemaking proposes changes to the rules that will deny equipment authorization to cellular-capable scanners meeting the technical parameters in § 15.121, the Commission should, in the course of this rulemaking, provide for the withdrawal of previously granted equipment authorizations granted effective April 26, 1994. ^{2/}

Specifically, BellSouth recommends that the Commission delete the last sentence of proposed § 15.37(f) and add the following:

All equipment authorizations for scanning receivers and frequency converters used with scanning receivers that do not comply with the provisions of Section 15.121 of this Part shall be withdrawn effective April 26, 1994.

BellSouth submits that this modification will establish a reasonable procedure for withdrawing equipment authorizations and satisfy the amortization period required by Section 2.939(c). ^{2/} At the same time, it will provide manufacturers and importers with a powerful disincentive to build up an inventory of cellular-capable scanners prior to April 26, 1994, because such equipment would not be saleable after that time.

^{2/} 47 C.F.R. § 2.939(c).

^{2/} The Commission estimated that there have been "22 different models of scanning receivers capable of receiving cellular telephone transmissions" and another ten "models capable of tuning frequencies between 806 and 900 MHz *except* for the cellular bands" authorized over the past five years. NPRM at ¶ 4 (emphasis in original).

^{2/} Section 2.939 also provides for the revocation of equipment authorizations under various circumstances, including cases involving "conditions coming to the attention of the Commission which would warrant it in refusing to grant an original application." 47 C.F.R. § 2.939(a)(4). As the Communications Act as amended by the Telephone Disclosure and Dispute Resolution Act (Pub. L. 102-556) makes the grant of applications for scanning receivers and frequency converters illegal upon the effective date of rules adopted in the instant docket, BellSouth submits that the conditions of Section 2.939(a)(4) are met with regard to previously authorized equipment prohibited by the statute. Revocation procedures, however, would unnecessarily burden the Commission's resources and thus, should be avoided to the extent that the Commission adopts adequate procedures for withdrawing such authorizations pursuant to § 2.939(c).

III. EFFECTIVE APRIL 26, 1994, THE COMMISSION SHOULD PROHIBIT THE MANUFACTURE AND IMPORTATION OF NON-SCANNING RECEIVERS (OTHER THAN TEST EQUIPMENT) CAPABLE OF INTERCEPTING CELLULAR CALLS

New Section 302(d)(2) of the Communications Act provides that effective no later than April 26, 1994, "no receiver having the capabilities described in subparagraph (A), (B) or (C) of paragraph (1)" -- i.e., no receiver capable of receiving transmissions on cellular frequencies, capable of being readily alterable to do so, or equipped with digital cellular decoders -- "shall be manufactured in the United States or imported for use in the United States." ^{2/} This provision is not limited to scanning receivers, but rather prohibits the manufacture or importation of all receivers capable of receiving cellular transmissions. Thus, the statute imposes on the Commission a duty to forbid the continued manufacture and importation not only of cellular-capable scanners, but also of non-scanning receivers that are cellular-capable.

While the statute requires the Commission to deny equipment authorizations for cellular-capable scanners, it does not require the denial of equipment authorizations for cellular-capable non-scanning receivers. Nevertheless, the denial of equipment authorization for non-scanning cellular-capable receivers is needed to carry out the purpose of Section 302(d)(2). Otherwise, there would be no practical obstacle to the manufacture and importation of equipment that Congress explicitly prohibited.

BellSouth recognizes that there may be certain types of legitimate test equipment that may be capable of receiving cellular frequencies, whether scanning or otherwise, such as the variable-frequency receivers used to perform measurements in support of equipment authorization applications. Test equipment used in manufacturing or servicing cellular telephones or cellular base station equipment will also need the capability of receiving transmissions on cellular frequencies. Since there is no evidence that Congress sought to prohibit the continued manufacture of necessary, legitimate test equipment, the Commission should make clear in its Report and Order that legitimate test equipment does not fall within

^{2/} 47 U.S.C. § 302(d)(2).

the prohibitions of the statute, when used solely for measurement, testing, and servicing procedures, rather than for interception of cellular conversations, or when used by law enforcement officials to intercept cellular communications pursuant to lawful authority. Accordingly, the Commission should continue to grant equipment authorizations for such equipment. BellSouth urges the Commission to define the permitted class of receivers very narrowly, however, so as not to open an opportunity for widespread interception of cellular telephone conversations. Moreover, the Commission should make clear that the use even of lawful equipment to intercept cellular telephone calls remains a criminal offense.^{2/}

IV. ENTRY OF AN ACCESS CODE SHOULD BE INCLUDED AS A PROHIBITED MEANS OF USER ALTERATION

Proposed Section 15.121 defines receivers "capable of 'readily being altered by the user'" to include, among others, "those for which the ability to receive transmissions in the restricted bands can be added by clipping the leads of, or installing, a diode, resistor and/or jumper wire; or replacing a plug-in semiconductor chip."^{10/} BellSouth supports the proposed rule and suggests that the Commission make clear that the prohibition also extends to devices that can be programmed to receive cellular transmissions by entry of an access code or by reprogramming a memory module.

^{2/} Because there may be various electronic devices capable of receiving cellular transmissions already in widespread use, such as amateur radio receivers, BellSouth requests that the Commission emphasize in the Report and Order in this proceeding that it is illegal to intercept cellular communications using such devices, even if the equipment itself was lawfully manufactured or imported. Specifically, the Omnibus Crime and Safe Streets Act, as modified by the Electronic Communications Privacy Act, makes it unlawful to "intentionally intercept[] . . . any wire, oral, or electronic communication," 18 U.S.C. § 2511(1)(a), and violations may result in fines and/or imprisonment, 18 U.S.C. § 2511(4)(a). Thus, the use of otherwise lawful devices to intercept cellular transmissions is strictly prohibited and unlawful.

^{10/} Proposed § 15.121. Scanning receivers and frequency converters used with scanning receivers capable of converting digital cellular transmissions to analog voice are also prohibited. *Id.* The Commission does not, however, intend to prohibit "cable television converters, or similar devices that may be capable of tuning to cellular frequencies." See NPRM at n.8. Further, "[r]eceptors designed solely for the reception of the broadcast signals under part 73 of this chapter or for operation as part of a licensed station are not included in this definition." 47 C.F.R. § 15.3(v).

Most contemporary scanners are microprocessor-controlled, with a keypad or similar device serving as a user interface. Manufacturers should not be permitted to obtain equipment authorization for scanners whose restriction on scanning cellular frequencies can be defeated by entry of a secret combination or sequence of keys or by reprogramming a programmable read-only memory ("PROM") chip. ^{11/} If a keypad sequence or combination can be used to activate cellular scanning, it will inevitably be discovered by hobbyists. Similarly, if cellular frequencies are locked out by instructions coded into a PROM that can be erased and reprogrammed without removal from the unit, it would not be difficult for a technically skilled experimenter to develop modified PROM code to enable cellular scanning.

To preclude such modifications, BellSouth suggests that the Commission amend the second sentence of proposed § 15.121 to read:

Receivers capable of "readily being altered by the user" include, but are not limited to, those for which the ability to receive transmissions in the restricted bands can be added or enabled by removing, clipping the leads of, or installing, a diode, resistor, and/or jumper wire; or replacing or reprogramming a semiconductor chip, or by entry of a secret combination or sequence of keys, instructions, or codes.

Moreover, some cellular telephones may at present or in the future be capable of functioning as scanning receivers by activating a "test" or "diagnostic" mode, by depressing a sequence or combination of keys that is not ordinarily disseminated to the public by the manufacturer. If the secrecy of this access code is compromised, either through experimentation or through publication in an installation or service manual, such a cellular telephone would function as a scanning receiver that violates § 15.121. The Commission should make clear that such operation is not a function required in the licensed operation of a cellular telephone and will result in denial of type acceptance for the unit. This policy would not unduly restrict maintenance and testing of cellular telephones, but it would prevent

^{11/} Similarly, customers should not be able to defeat the cellular limitation by replacing a PROM chip, whether soldered or plug-in. A PROM chip is sufficiently secure to prevent alteration only if it cannot be removed or reprogrammed without risking destruction of other circuitry (e.g., attached to circuit board by epoxy).

unauthorized personnel from readily converting cellular telephones into cellular scanners, which would defeat the purpose of the Act.

CONCLUSION

For the foregoing reasons, the Commission's proposals discussed above should be adopted as modified in accordance with these Comments.

Respectfully Submitted,

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I, Mary Jane Adcock, hereby certify that on this 22nd day of February, 1993, copies of the foregoing "Comments of BellSouth Corporation" were served via hand delivery to the following:

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